In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
and
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

APPELLANTS' REPLY BRIEF

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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NOTE: This reply brief is not a comprehensive treatment of the issues. It is a seriatim response to some of the points raised by the Appellee. Appellants respectfully refer the

Court to their main brief for fuller coverage of each of the topics mentioned herein.

I. The Action Is Not Moot

A. *The Time Frame Precludes Review By This Court.*

Appellee's statements with respect to the time available for litigation actually demonstrate the truth of Appellants' contention that the statutory proscription against corporations operated in a time frame too short for complete adjudication. The Attorney General points out that a suit to challenge Mass. Gen. Laws c. 55, §8 could have been commenced "nearly eighteen months prior to the election" (A. Br., 11):[1]

> If the suit had begun in May of 1975 and proceeded through all stages at exactly the same pace as this litigation, it could have been submitted to this Court while the controversy was a current one. Thus the limited period for review in this case is a direct consequence of the Appellants' trial strategy and is not a result of the operation of natural or man-made laws.

No matter when commenced, this case could not have been brought through to a Supreme Court conclusion in time to afford Appellants relief. *Cf. Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911) (2 year order of ICC deemed "evading review"). The instant action was commenced by seeking declaratory relief before a single justice of the Supreme Judicial Court on April 9, 1976. The case was argued before the full court on June 8, 1976. Although judgment was rendered on September 28, 1976, no opinion

[1] Appellee's brief is cited herein as "A. Br.".

issued until February 1, 1977, eight months after argument. This Court denied Appellants' motion to stay the decision of the Supreme Judicial Court on October 6, 1976. The case is scheduled for oral argument before this Court 19 months after the filing of the complaint. Assuming, *arguendo*, that exactly the same time would have been consumed had Appellants filed their complaint on May 8, 1975, one day after the Massachusetts legislature took the final action necessary to place the graduated income tax amendment on the November 1976 ballot,[2] Appellants would have presented argument to this Court no earlier than December 1976. The election was held November 2, 1976. A decision following this argument would have come several weeks or months after the election.

Furthermore, any decision invalidating the statute and allowing corporate spending would have to come well in advance of the election date itself in order to allow Appellants an opportunity to make any effective communication to the voters. The right to communicate, if recognized two days or two weeks before the election, would have little value.

The Attorney General does not, and could not, argue that the case would indeed have proceeded through the Supreme Court in less than eighteen months had the action been commenced in May, 1975. In fact, it is unlikely that any such suit would have proceeded as fast as the instant action did. The relative speed with which this case was acted upon was due in no small measure to the courteous cooper-

[2] After passage by two consecutive sessions of the Massachusetts General Court, a proposed constitutional amendment must be certified by the clerk of the joint session to the Secretary of the Commonwealth before it can be submitted to the voters. Mass. Const. Amend. Art. 48, IV, §5. The amendment in question received final approval by the General Court on May 7, 1975 and was received by the Secretary's Office on May 29, 1975. (J.S. 9 n.4, J.S. App. 43-44).

ation of the Attorney General and the active assistance of the Massachusetts single justice, who perceived that the issue at stake was both novel and important and that time was pressing. Considerable expedition was afforded this case so that the Massachusetts court itself could rule on the matter before the election. Furthermore, if one uses the instant case as a guide but looks to the court schedules which would have been encountered had the action actually been commenced in May, 1975, this Court would not have heard argument until February, 1977—20 months after the filing of the complaint and three months after the election.[3]

In conclusion, nothing in the record suggests that delay was a trial strategy. It was not. The earlier the case had been commenced, the less likely speedy treatment would have been afforded. Even had an action, commenced in May of 1975, proceeded at the same pace, this Court would not have heard oral argument before the election. It is totally unlikely that an opinion could have issued in time to permit meaningful expenditures or contributions.

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[3] This action, commenced on April 9, 1976, was argued before the full bench of the Supreme Judicial Court two months later. An action commenced in May, 1975 would not have been argued until September, 1975, at the earliest given the summer recess. *Calendar of Assignments of the Justices of the Supreme Judicial Court of Massachusetts for the year beginning September 1, 1975 and ending August 31, 1976.* If there had been an argument before the full bench in September, 1975, no opinion could be expected until May, 1976 based on the eight month delay in the instant case. This Court adjourned on July 6, 1976. *Journal of the Court for the 1975 Term*, at 777. Once again, based on the record in the instant action, no summary reversal, stay, or injunction would have been granted by this Court, nor would the action have been expedited. Such relief was in fact denied in this case. Based upon the fact that oral argument in the instant case has been scheduled nine months after the issuance of the Supreme Judicial Court opinion, the matter would not have been argued before this Court until February, 1977.

B. *Reasonable Likelihood That The Issues Could Recur.*

The Attorney General argues that it "cannot be conclusively presumed" that a graduated income tax question will again be placed on the ballot (A. Br. 9). But a "reasonable expectation" and not a conclusive presumption is all that is required. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). *See also Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The precise form which the next proposed tax question may take is not critical. Chapter 55, §8, prohibits expenditures or contributions with respect to *any* ballot question dealing solely with taxation of individual income or property.

The contention that a future case will present a better record (A. Br. 8, 10) ignores the fact that a central issue on appeal is whether such a record must be produced, in other words, whether Appellants' First Amendment rights depend upon *proof* by Appellants that their interests are in fact materially affected. To argue that action by this Court should await a case with a "better record" ignores not only the actual record in the instant action, which includes a detailed statement of facts, but also ignores Appellants' argument that the type of trial necessary to produce a "better record" is itself an impermissible burden upon, and chills the exercise of, First Amendment rights.

This Court has been especially sensitive to the need to avoid an unrealistic and formalistic test of mootness in the First Amendment context. *E.g., Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-47 (1976). The continuing nature of the controversy and the need for clarification by this Court is well illustrated by a recent Supreme Judicial Court ruling, in which that court declined to answer certain questions propounded by the House of Representatives of the Commonwealth of Massachusetts with respect to the consti-

tutionality of proposed changes to Mass. Gen. Laws c. 55, §§6, 7 and 8 because the instant action was pending before this Court and its resolution would affect the entire statute.[4] *Answer of the Justices,* Mass. Adv. Sh. (1977) 1845, ___ N.E.2d ___. The proposed changes would not have altered in any way the specific language in §8 attacked by Appellants. Nevertheless, the Court responded to the House of Representatives as follows:

> While the questions propounded by the House do not directly concern our holding in *First Nat'l Bank,* the entire statutory scheme on which the further limitations imposed by the proposed legislation are engrafted is dependent for its validity on the constitutional validity of the basic limitation contained in the current G.L. c. 55, §8, and continued in §3 of the proposed bill. While any of the limitations contained in the proposed bill may have their validity or invalidity adjudged in the abstract, in terms of advising the House as to the over-all validity of the proposed legislation the two matters cannot be separated.

[4] The questions propounded by the House were concerned with the constitutionality of a pending bill which would: (1) prohibit committees promoting or opposing ballot questions from receiving more than $1,000 in contributions from any corporation; (2) limit the number of committees promoting or opposing ballot questions to one committee for the opponents and one for the proponents; (3) limit corporations to contributions of $1,000 for each question materially affecting such corporation; (4) prohibit corporations from expending more than $1,000 to influence the vote on any question which materially affects the corporation; (5) prohibit persons or political committees promoting or opposing ballot questions from soliciting or receiving any contributions from persons, political committees or corporations located outside the Commonwealth and (6) prohibit utility companies from including in their billing process information or advertising materials aiding or defeating the nomination or election of any person, promoting or antagonizing the interest of any political party, or from influencing the vote on a question submitted to all voters of the Commonwealth. *Answer of the Justices,* Mass. Adv. Sh. (1977), 1845, 1845-47, ___ N.E. ___, ___.

> The question before the Supreme Court concerning the validity of G.L. c. 55, §8, is an issue of first impression and one of considerable difficulty. *Id.* Mass. Adv. Sh. (1977) at 1851, ___ N.E.2d at ___.

There is a critical need for clarification to eliminate the chilling effect of the continuing statutory restrictions which impinge directly on speech. Note, *First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970). The heavy criminal penalties for violation of §8 discourage challenge by violation and criminal prosecution. *See* Monaghan, *First Amendment "Due Process",* 83 Harv. L. Rev. 517, 547-49 (1970).

This Court has repeatedly recognized the importance of clarifying the constitutionality of election statutes despite the fact that two to four years are generally available for future litigation. *Storer* v. *Brown,* 415 U.S. 724, 738 n.8 (1974). The holdings in the two election cases relied upon by Appellee (A. Br. 12 n.5) for the proposition that election cases are not unique turned upon factors other than the mere passing of the election. *See* Appellants' main brief at 24 n.10.

II. The Section 8 Prohibition Is Unconstitutional as a Violation of Freedom of Expression.

The Attorney General characterizes Mass. Gen. Laws c. 55, §8 as a "law [which] simply forbids corporate managers from spending corporate money to express their *personal views"* (A. Br. 18) (emphasis added). At the same time the Attorney General has *agreed* that it is the position of the Appellants' management that Appellants' business and property would be materially affected. (A. 17-21). The personal views of Appellants' corporate managers are not at issue in this case and the record does not reflect what

those views may be. The Supreme Judicial Court did not construe the law simply as forbidding expression of personal views. It specifically held that §8 prohibited expenditures or contributions despite a reasonable belief by management that the interests of the company were materially affected. (J.S. App. 15 n.15.)

People v. *Gansley*, 191 Mich. 357, 158 N.W. 195 (1916), relied upon by Appellee for the proposition that restrictions on corporate expenditures in election campaigns do not violate the due process clause (A. Br. 24) has been effectively undercut by *Advisory Opinion 1975 PA 227*, 396 Mich. 465, 242 N.W. 2d 3 (1976), in which the Supreme Court of Michigan differentiated between corporate contributions or expenditures for the purpose of influencing the nomination or election of a candidate and those made for the purpose of influencing the passage or defeat of a ballot question.

> Contributions or expenditures by corporations to communicate their positions or opinions concerning ballot questions serve to enlighten the public and encourage an informed decision-making process. [Footnote omitted] Such contributions or expenditures create no danger of incurring obligations from an elected official to a major contributor. The right of the public to be informed is a paramount consideration in seeking to preserve the free exchange of ideas in the market place. [Footnote omitted] *Id.*, 396 Mich. at 494; 242 N.W.2d at 14.

Appellee seeks to justify §8's total prohibition of expenditures or contributions with respect to one type of ballot question by referring to the undisputed proposition that corporations may be regulated by the state. Appellee goes on to state that "[t]his Court repeatedly has upheld over

First Amendment objections regulatory schemes which restrict corporate communication so long as they do not discriminate against communications media." (A. Br. 25). However, none of the decisions cited in support of this statement (A. Br. 25-26) focus on the 'corporateness" of the petitioner, and the results presumably would have been the same regardless of whether or not corporations were involved.[5] Appellees do not dispute that regulatory schemes which incidentally impinge upon First Amendment rights have been upheld. The instant case does not fall within that category.

In support of its argument that "[t]he Commonwealth has substantial interests in preventing corporations from making contributions or expenditures to influence the vote on referendum and initiative issues", Appellee refers the Court to 30 state statutes and the Federal Corrupt Practices Act, 2 U.S.C. §441(b), as examples of statutes "restricting contributions either by limiting them as to amount or restricting the source from which they are received." (A. Br. 32, n.19). Section 8 does not merely limit contributions. It totally prohibits them. Furthermore, §8 prohibits not only all contributions but all expenditures. Few of the statutes cited by the Attorney General are as sweeping.[6] The list of statutes is misleading for other

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[5] Cases such as *Associated Press* v. *NLRB*, 301 U.S. 103 (1937) (A. Br. 25), actually support Appellants' contention that the media has no special First Amendment protection. In that action, the Court held that the discharge of an employee by the Associated Press was subject to the National Labor Relations Act.

[6] Federal Corrupt Practices Act, 2 U.S.C. §441(b) does not apply to ballot questions.

Ala. Code. Tit. 17, §286 (1958) prohibits corporate contributions and expenditures to defeat ballot questions.

Ariz. Rev. Stat. §16-471(A), (H) (1975) prohibits corporate contributions for the purpose of influencing an "election", which term does not encompass ballot question "elections".

Ark. Stat. Ann. §3-1110 (1976) does not apply to ballot questions. With respect to candidate contributions, any person, including a corporation, may contribute up to $1,000 per candidate per election.

reasons. It is used to support a purported interest by the Commonwealth in prohibiting spending respecting the vote on ballot questions, but several of the statutes do not prevent corporate spending with respect to ballot questions.

Del. Code Ann. tit. 15, §8004(a) (Supp. 1976) does not apply to ballot questions, and any person may contribute $1,000 per candidate per statewide election.

Fla. Stat. Ann. §106.08(1) (Supp. 1977) does not single out corporations for special treatment. While the statute does apply to ballot questions, it allows contributions up to $3,000 in support of, or in opposition to, an issue to be voted on in a statewide election.

Ind. Code Ann. §3-4-3-3 (Supp. 1976) authorizes corporations to make political contributions to (a) aid in the success or defeat of a principle, measure or proposition submitted to a vote in an election; (b) aid in the election or defeat of a candidate; and (c) to aid in the success or defeat of a political party. Only contributions to, or on behalf of, candidates and political parties are limited.

Iowa Code Ann. §56.29 (Supp. 1977-78) prohibits corporate contributions for the purpose of influencing the vote of any election. *But see* Op. Atty. Gen. (Coleman), June 18, 1975.

Kan. Stat. §25-1709 (1973) prohibits limited types of corporations from paying or contributing in order to influence the vote on any question submitted to the voters.

Ky. Rev. Stat §121-035(1) (Supp. 1976) prohibits corporations from furnishing money or any other thing of value to any "political or quasi-political organization . . . to be used by such organization for any purpose whatever."

La. Rev. Stat. Ann. §18-1488(C) (Supp. 1977) does not apply to ballot questions. It prohibits corporate contributions or expenditures to or on behalf of candidates and political parties unless such contributions or expenditures have been specifically authorized by vote of the board of directors of the corporation.

Me. Rev. Stat. Ann. tit. 21, §§1395.2, 1395.3 (Supp. 1976-77) does not apply to ballot questions; corporations may contribute to a candidate, in support of the candidacy of one person, an aggregate amount no greater than $5,000 in any election.

Md. Ann. Code art. 33, §26-9(b) (1976) does not apply to ballot questions. Corporations, like individuals, may contribute up to $2,500 to candidates in any primary or general election.

Mass. Gen. Laws Ann. c. 55, §8 (Supp. 1976) prohibits corporate expenditures and contributions on ballot questions unless the corporations are "materially affected" by such questions. Additionally, the statute provides that any ballot question solely concerning the taxation of individuals shall be deemed not to materially affect a corporation.

The chief state interest advanced in support of §8 is one of preventing corporate funds from overwhelming the electorate. (A. Br. 35-37) But the record does not support the proposition that corporations have overwhelmed the electorate. Assuming, *arguendo*, that the Coalition for

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Minn. Stat. Ann. §210A.34 (Supp. 1977) prohibits corporate contributions for "any political purpose whatsoever." This may or may not encompass ballot questions. *See Schwartz* v. *Romnes*, 495 F.2d 844 (2d Cir. 1974).

Mo. Ann. Stat. §130.020.5 (Supp. 1977) does not apply to ballot questions. It prohibits labor unions and corporations from making contributions or expenditures in support of or in opposition to any candidate or political committee.

Mont. Rev. Codes Ann. §§23-4795(1), 4744 (Supp. 1975) prohibits corporate contributions and expenditures on ballot questions. *But see C & C Plywood Corp.* v. *Hanson*, 420 F.Supp. 1254 (D. Mont. 1976), *appeal docketed*, No. 76-3118 (9th Cir. September 29, 1976).

N.H. Rev. Stat. Ann. §70:2(I), (II), (III) (1970) prohibits contributions by corporations, partnerships and labor unions for the purpose of promoting the success or defeat of ballot questions.

N.J. Stat. Ann. §19:34-45 (1964) does not apply to ballot questions.

N.Y. Election Law §480 (McKinney Supp. 1976-77) prohibits corporate contributions "for any political purpose whatever". This language has been construed as not applying to ballot questions. *Schwartz* v. *Romnes*, *supra*.

N.C. Gen. Stat. §§163-278.15, 163-278.19 (1976) prohibits corporations and labor unions from making any contributions and expenditures for "any political purpose whatsoever." This may or may not encompass ballot questions. *See Schwartz* v. *Romnes*, *supra*.

N.D. Cent. Code §16-20-08 (Supp. 1977) prohibits corporate contributions and expenditures for any political purpose or for the influencing of legislation.

Ohio Rev. Code Ann. §3599.03 (Baldwin) (1971), which prohibits the use of corporate funds for any "partisan political purpose" has been held not to apply to "the adoption of a constitutional amendment or the passage of a bond-issue or of a tax levy . . ." *Corrigan* v. *Cleveland-Cliffs Iron Co.*, 169 Ohio St. 42, 45, 157 N.E. 2d 331, 334 (1959).

Okla. Stat. Ann. tit. 26, §15-110 (Supp. 1976) prohibits corporate contributions on state ballot questions.

Or. Rev. Stat. §260.472 (1975) does not apply to ballot questions.

Pa. Stat. Ann. tit. 25 §3225(b) (Purdon) (1964) does not apply to ballot questions.

Tax Reform, Inc., the only nonpolitical committee organized to promote the 1972 proposal, raised and expended only seven thousand dollars in support of the ballot question (A. 26),[7] the record is completely silent as to the total amount of money *expended* by individuals, trusts, partnerships, or nonprofit organizations, such as the League of Women Voters. Mass. Gen. Laws c. 55 does not require that such direct expenditures, which are not limited, be reported. The record is also silent as to the total amount of corporate expenditures relating to the 1972 graduated income tax referendum. Thus, with respect to the expenditure ban, the record lends no support to the argument that the statute is supported by a rational, much less a compelling, state interest in preventing undue influence.

The two cases relied upon as supporting bans on corporate campaign contributions (A. Br. 41) are readily distinguishable. Appellee quotes from the district court

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S.D. Compiled Laws §12-25-2 (Supp. 1977) prohibits corporate contributions to a committee collecting or disbursing money for the adoption or defeat of any question submitted to the electors of the whole state.

Tenn. Code Ann. §2-1932 (Supp. 1976) prohibits corporate contributions and expenditures for the purpose of aiding in the success or defeat of ballot questions.

Tex. Elec. Code Ann. art. 14.06 (Supp. 1976-77) prohibits corporations and labor unions from making contributions and expenditures for the purpose of aiding or defeating the approval of ballot questions.

W. Va. Code §3-8-8 (1971) prohibits corporate contributions "for the payment of any primary or other election expense whatever". This may or may not encompass ballot questions. *Cf. Schwartz* v. *Romnes, supra.*

Wisc. Stat. Ann. §11.38(1)(a)(1) (Supp. 1977-78) prohibits corporate contributions and disbursements to promote or defeat referenda.

Wyo. Stat. §22.1-389.2 (Interim Supp. 1977) prohibits corporations, partnerships, trade unions, professional associations and civil, fraternal and religious groups from contributing funds or election assistance to promote the success or defeat of any ballot proposition.

[7] It is likely that the statements filed with the Secretary of State significantly understate actual deposits. (A. 34-36)

decision in *Schwartz* v. *Romnes*, 357 F.Supp. 30 (S.D.N.Y. 1973), noting, without discussion, that it was "reversed on other grounds," 495 F.2d 844 (2d Cir. 1974) (A. Br. 41). However, the casually referenced "other grounds" totally undercut the precedential value of the district court decision. The district court construed a New York statute prohibiting corporate political contributions as prohibiting contributions made to influence referenda, and held that the statute did not violate the First Amendment. The Second Circuit reversed. It held that the statute did not prohibit corporate contributions or expenditures with respect to referenda. The appellate decision consciously adopted a narrow construction specifically to avoid "transgress[ing] constitutional rights . . . including those of corporate contributors which, like individuals, are guaranteed freedom of speech and petition." 495 F.2d at 852 (citations omitted). The Second Circuit unequivocally rejected the notion that the interests which may justify restrictions upon contributions to candidate campaigns are transferrable to restrictions upon referenda contributions. *Id.* at 851.

United States v. *Chestnut*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976) is inapposite. The Second Circuit upheld the federal ban on corporate campaign contributions, 18 U.S.C. §610, relying entirely on the district court's discussion of the constitutional claims. *Id.* at 50. The district court specifically recognized "the First Amendment right of corporations and labor unions" but found such rights outweighed by:

> the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote *political parties and candidates* without the consent of stockholders or union members with different political views, and in protecting individuals who may refuse to con-

tribute to campaign funds against reprisals. *The need for these safeguards is particularly acute in the labor field where union membership can be a condition of employment.* (emphasis added) (footnotes omitted) 394 F.Supp. 581, 590 (S.D.N.Y. 1975).

Section 610 (now 2 U.S.C. §441b) does not purport to ban contributions or expenditures relating to ballot questions. In order to rule in favor of the Appellants, this Court need not decide whether the Constitution forbids limitations on corporate expenditures or contributions *relative to candidates and political parties.*

Moreover, §610 applies equally to labor unions as well as to corporations and it, unlike c. 55, §8, permits the establishment of segregated funds for political purposes. This factor was noted by the Court in *Buckley* v. *Valeo,* 424 U.S. 1, 28 n.31 (1976), in upholding the $1,000 contribution limitation in the Federal Election Campaign Act, 18 U.S.C. §608(b).

All recent cases which have ruled upon constitutional challenges to statutes restricting contributions or expenditures with respect to ballot questions have considered the *Buckley* decision dispositive,[8] and all have ruled that such

[8] The Supreme Judicial Court's decision also runs counter to recent legal authority clearly establishing the proposition that non-media corporations have First Amendment rights. *E.g., International Union UAW* v. *National Right to Work Legal Defense and Education Foundation, Inc.,* 433 F.Supp. 474 (D.D.C. 1977), *appeal docketed,* Nos. 77-1739, 77-1766 (D.C. Cir. Aug. 16, 1977, Aug. 23, 1977), holding §101(a)(4) of the Labor Management Reporting & Disclosure Act, 29 U.S.C. §411(a)(4), which prohibits interested employers from supporting union members' lawsuits against their unions, unconstitutional under the First Amendment when applied to prohibit a right-to-work organization, funded chiefly by contributions from interested employers, from funding union member lawsuits against unions. The court relying in part upon *Buckley* v. *Valeo,* 424 U.S. 1 (1976) held that Congress may not constitutionally restrict the First Amendments rights of such an organization or its contributors.

> [The challenged provision] *clearly, directly, and absolutely* interferes with the first amendment rights of petition, association, and speech of the Foundation and its contributors . . . the first amendment has traditionally been construed strictly in cases involving political expression. 433 F.Supp. at 482.

restrictions are unconstitutional. *C & C Plywood Corp.* v. *Hanson,* 420 F.Supp. 1254 (D.Mont. 1976), *appeal docketed,* No. 76-3118 (9th Cir. September 29, 1976); *Pacific Gas & Electric Co.* v. *Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); *Citizens for Jobs and Energy, Inc.* v. *Fair Political Comm'n,* 16 Cal. 3d 671, 547 P.2d 1386 (1976); *Advisory Opinion 1975 PA 227,* 396 Mich. 465, 242 N.W.2d 3 (1976). The Supreme Judicial Court found *Buckley* to be irrelevant (J.S. App. 10-11) and upheld the prohibition.

III. Conclusion

Appellants urge the Court to enter one or more of the decrees suggested at pp. 87-88 of their main brief.

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